U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of FRANCIS M. WILLETT and DEPARTMENT OF THE ARMY, FREIGHT OPERATIONS, FORT KNOX, KY

*Docket No. 98-107; Submitted on the Record;*
*Issued August 4, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

The Board has carefully reviewed the record evidence and finds that the Office properly denied appellant's reconsideration request by decision dated June 23, 1997.

Section 8128(a) of the Federal Employees' Compensation Act[1] does not entitle a claimant to a review of an Office decision as a matter of right.[2] Rather, the Office has the discretion to reopen a case for review on the merits, on its own motion or on application by the claimant. The Office must exercise this discretion in accordance with section 10.138(b) which provides that the Office will not review a decision denying or terminating benefits unless the application is filed within one year of the date of that decision.[3] The Board has held that the imposition of the one-year time limitation for filing an application for review is not an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[4]

The one-year time limitation does not restrict the Office from performing a limited review of any evidence submitted by a claimant with an untimely application for reconsideration.[5] The Office is required to review such evidence to determine whether a claimant has submitted clear evidence of error on the part of the Office, thereby requiring merit

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[1] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8128(a).

[2] *Leon D. Faidley, Jr.*, 41 ECAB 104, 109 (1989) .

[3] 20 C.F.R. § 10.138(b)(2); *Larry J. Lilton*, 44 ECAB 243, 249 (1992).

[4] *Leon D. Faidley, Jr., supra* note 2 at 111.

[5] *Bradley L. Mattern*, 44 ECAB 809, 816 (1993).

review of the claimant's case.[6] Thus, if reconsideration is requested more than one year after the issuance of the decision, the claimant may obtain a merit review only if the request demonstrates clear evidence of error on the part of the Office.[7]

Clear evidence of error is intended to represent a difficult standard.[8] The claimant must present evidence which on its face shows that the Office made an error such as, for example, proof of a miscalculation in a schedule award. Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further evidentiary development by the Office, is not clear evidence of error.[9]

To establish clear evidence of error, a claimant must submit positive, precise and explicit evidence relevant to the issue decided by the Office, which demonstrates on its face that the Office committed an error.[10] The evidence submitted must be sufficiently probative not only to create a conflict in medical opinion or establish a clear procedural error, but also to shift the weight of the evidence *prima facie* in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[11] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[12]

In this case, appellant's notice of occupational disease, filed on December 11, 1991, was accepted by the Office for aggravation of plantar fascitis. Appellant returned to light duty, but filed a notice of recurrence of disability on November 18, 1994. By letter dated January 10, 1995, the Office provided appellant with 30 days, in which to submit evidence in support of his claim, noting that the most recent medical report dated November 18, 1994[13] stated that "there was no evidence of anything that should restrict [appellant's] work capacity." The Board notes that the original of this letter, contained in the case record, does not contain any handwritten notation concerning appellant's address in Bardstown, Kentucky.

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[6] *Howard A. Williams*, 45 ECAB 853, 857 (1994).

[7] *Jesus S. Sanchez,* 41 ECAB 964, 968 (1990).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[9] *Id.*; *see Gregory Griffin*, 41 ECAB 186, 200 (1989), *petition on recon. denied*, 41 ECAB 458 (1990) (finding that the Office's failure to exercise discretionary authority to review medical evidence submitted with an untimely reconsideration request required remand).

[10] *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

[11] *Veletta C. Coleman*, 48 ECAB ___ (Docket No. 95-431, issued February 27, 1997).

[12] *Gregory Griffin*, *supra* note 9.

[13] Based on the November 18, 1994 report of Dr. Martyn A. Goldman, a Board-certified orthopedic surgeon, the Office denied appellant's claim for a schedule award on December 12, 1994.

On March 8, 1995 the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence failed to establish any causal relationship between the accepted work injury and his current condition. The Office noted that a January 26, 1995 report of appellant's functional capacity evaluation did not support any recurrence of disability.

The Office attached to its March 8, 1995 decision, a copy of appellant's appeal rights. The information stated that if a claimant has additional evidence he believed to be pertinent, he may request reconsideration of the decision; such a request must be made within one year of the date of the decision, must be in writing and must clearly state the grounds for such a request.

Appellant's request for reconsideration was dated May 7, 1997, well beyond one year from the March 8, 1995 date of the Office's decision denying his claim. Therefore, appellant's request was untimely filed.

Given the untimely filing, the Office properly performed a limited review to determine whether the evidence submitted by appellant in support of his request for reconsideration established clear evidence of error, thereby entitling him to a merit review of his claim.[14]

The Board finds that appellant's statements, attributing his current knee, shoulder and neck problems to his work as fuel tanker driver from 1987 to 1990 and criticizing the second opinion evaluation he underwent in November 1994, are insufficient to establish clear evidence of error. As stated previously, this standard requires that appellant present evidence that is not only sufficiently probative to create a conflict in medical opinion but also *prima facie* probative enough to shift the weight of the evidence in favor of appellant and raise a substantial question regarding the correctness of the Office's September 9, 1995 decision. Appellant's statements are not medical evidence linking his current condition to the accepted work injury and thus fall far short of this standard.[15]

Appellant argued on reconsideration that he never received the March 8, 1995 decision denying his claim because on or about March 10, 1995 he moved. He submitted a photocopy of the Office letter dated January 10, 1995, addressed to his home in Loretto, Kentucky. This photocopy, received by the Office on May 9, 1997, includes handwriting noting "112 Westwind Tr. Bardstown, Ky. 40004." Appellant contends that this document establishes that the Office had notice of his new address prior to issuance of the March 8, 1995 decision. However, the Board has compared the photocopy of the January 10, 1995 letter, with the original contained in the case record. The original does not contain any handwritten notations concerning appellant's address change to Bardstown, Kentucky. For this reason, appellant has not established that the Office had notice of his new address prior to issuance of the March 8, 1995 decision. Further, he

[14] *See Robert M. Pace*, 46 ECAB 551-52 (1995) (finding that in determining clear evidence of error, Office procedures require a brief evaluation of the evidence so that a subsequent reviewer will be able to address the issue of Office discretion).

[15] *See John B. Montoya*, 43 ECAB 1148, 1153 (1992) (finding that the medical evidence addressing the pertinent issue of causal relationship was insufficiently probative to establish clear evidence of error); *Dean D. Beets*, 43 ECAB 1153, 1158 (1992) (same).

has not established that the photocopied handwritten notation was made by any personnel working for the Office. For these reasons, appellant's contentions are without merit.

The March 8, 1995 decision was mailed to appellant at his then-current address in Loretto, Kentucky. The Office subsequently received appellant's change of address because a June 1, 1995 postcard from the Office is addressed to appellant at his new home in Bardstown, Kentucky.

The evidence is not sufficient to support appellant's claim that he never received the March 8, 1995 decision. Inasmuch as the Board has held that, absent evidence to the contrary, it is presumed that a notice mailed to an individual in the ordinary course of business was received by that individual,[16] the Board finds that appellant received the March 8, 1995 decision.

Inasmuch as appellant's request for reconsideration was indisputably untimely filed and he failed to submit evidence substantiating clear evidence of error,[17] the Board finds that the Office did not abuse its discretion in denying merit review of the case.

The June 23, 1997 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
August 4, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *Charles R. Hibbs*, 43 ECAB 700-01 (1992).

[17] *Compare Mary E. Hite*, 42 ECAB 641, 646 (1991) (finding that the medical evidence, which might have created a conflict in medical opinion, was insufficient to establish clear evidence of error) *with Ruth Hickman*, 42 ECAB 847, 849 (1991) (finding that the Office's failure to consider medical evidence received prior to its denial of a claim constituted clear evidence of error and thus required merit review of the evidence).